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No. 90-645

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

Norwest Bank Duluth, N.A.,
Petitioner,

v.

Minnesota Commissioner of Revenue
and the State of Minnesota,
Respondents.

Cambridge State Bank, et al.,
Petitioners,

v.

Minnesota Commissioner of Revenue,
Respondent.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Petitioners respectfully submit this Reply Brief in response to the Brief in Opposition filed by Respondents.[1]

I. The Petitioners Did Not Have a Prepayment Remedy.

Respondents allege that *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238 (1990), which involved a Florida tax, can be distinguished from the instant case because "Minnesota differs from Florida in its requirements for prepaying taxes prior to challenging them . . . Minnesota law, unlike that of Florida in *McKesson*, . . . allowed an appeal to its Tax Court *without* prepayment." (Resp. Br. 14-15.) However, as discussed below, the Tax Court prepayment option was not in fact available to Petitioners. Petitioners followed the only route then available in Minnesota for challenging the bank excise tax: payment of the tax followed by a refund suit in Minnesota district court.

Although Respondents are correct in stating that a taxpayer could have filed a petition in the Minnesota Tax Court without prepayment prior to (but not after) February 1, 1982, they fail to point out that the Tax Court would not have had jurisdiction to consider Petitioners' constitutional challenge to the Minnesota bank excise tax. The tax year here at issue is 1979. Petitioners filed 1979 tax returns in 1980, which would have been the earliest opportunity for them to challenge the bank excise tax imposed for

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[1] Reference is made to the Rule 29.1 Statement of Petitioners included in their petition for certiorari. The statement remains accurate without amendment.

1979. The Minnesota Supreme Court in 1980 decided a pair of cases, *Matter of McCannel*, 301 N.W.2d 910 (Minn. 1980) and *Guilliams v. Comm'r*, 299 N.W.2d 138 (Minn. 1980), in which the court held that the Tax Court had no jurisdiction to decide constitutional issues in cases filed initially with the Tax Court. The court held further that the Tax Court's jurisdiction over constitutional issues extended *only* to cases transferred to the Tax Court by a district court. *McCannel*, 301 N.W.2d at 919-20; *Guilliams*, 299 N.W.2d at 139, n. 1.[2]

Thus, Petitioners could not have initiated their constitutional challenge to the bank excise tax in the Minnesota Tax Court. They were required to commence suit in a Minnesota district court, and the rules applicable to district court litigation required payment of the tax. Jurisdiction over tax cases was conferred on the district courts by Minn. Stat. § 290.50, which authorized refund actions (not prepayment actions) to recover taxes paid "in excess of the amount legally due." (Pet. App. 50A.) Petitioners fully complied with Minn. Stat. § 290.50 by paying the tax here at issue, timely filing refund claims and timely commencing suit. (Pet. App. 20A.) Petitioners did not have a prepayment option and *McKesson* cannot

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[2] The Minnesota Supreme Court had raised the issue of the Tax Court's constitutional jurisdiction in an earlier case, *Harris v. Comm'r*, 257 N.W.2d 568, 569, n. 1 (Minn. 1977), but declined to rule on it because the issue had not been raised by the parties. Thus, any taxpayer bringing a constitutional challenge in the Tax Court after 1977 would have done so at considerable jurisdictional risk. In fact, even prior to 1977, constitutional questions had long been brought in the Minnesota district courts rather than the Minnesota Tax Court. *See* Johnson, *Administrative Procedures in the Minnesota Department of Taxation*, 41 Minn. L. Rev. 435, 443 (1957) ("problems of statutory interpretation are generally heard on appeal before the Board of Tax Appeals [i.e., the Tax Court], whereas constitutional questions are usually litigated in the district court.")

be distinguished on that basis.[3]

Petitioners also question Respondents' unsupported assertion that "nearly all states currently permit tax challenges without prepayment." (Resp. Br. 8.) Respondents' "belief" that only Massachusetts and Washington have a prepayment rule is obviously mistaken, since the tax required to be paid prior to challenge in *McKesson* was imposed by the State of Florida. Similarly, the taxpayers in *American Trucking Associations, Inc. v. Smith*, 110 S.Ct. 2323 (1990), had no prepayment option in Arkansas. The taxpayers were forced to obtain an escrow order from this Court because Arkansas insisted on continuing to collect the unconstitutional tax. *American Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (1987). Indeed, three out of the four states bordering Minnesota require payment of taxes before a challenge can be raised.[4] Petitioners believe that most states *do* require prepayment

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[3] Even if Petitioners could have challenged the bank excise tax in Tax Court, nothing in *McKesson* holds that a taxpayer must seek prepayment relief where the state provides a statutory refund procedure. The Minnesota Supreme Court, in upholding the constitutionality of the Tax Court, observed that "it is crucial to note that the taxpayer always has the option to file in district court," and that "this is perhaps the saving feature of the statutory scheme." *Wulff v. Tax Court of Appeals*, 288 N.W.2d 221, 225 (Minn. 1979). Petitioners clearly would be deprived of due process of law if it were held that they could be denied refunds for having failed to litigate in Tax Court, notwithstanding their full compliance with state refund procedures. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

[4] *See Hennick v. Wisconsin Dept. of Revenue*, No. 88-I-433 (Wisc. Tax App. Comm. Oct. 12, 1989) (1989 Wisc. Tax Lexis 36) (taxpayer subject to 25% incorrect return penalty for raising "good faith" constitutional claim by not paying tax; taxpayer should have paid tax and sued for a refund); Iowa Code § 421.8A (Iowa taxpayers must pay tax, penalty and interest or post bond prior to contesting disputed assessment); S.D. Codified Laws Ann. § 10-59-20 (South Dakota taxpayers required to pay taxes and seek refund).

of unconstitutional taxes, and for that reason the Minnesota Supreme Court's decision denying refunds is a very real threat to the enforcement of intergovernmental immunity doctrine rights.

II. The Decision of the Minnesota Supreme Court Conflicts with the Ninth Circuit's Decision in *U.S. v. City of Spokane.*

Respondents observe that Petitioners' request for certiorari is based on Rule 10.1(c) because the decision of the Minnesota Supreme Court conflicts with decisions of the United States Supreme Court. (Resp. Br. 6.) This is correct. However, since the filing of the petition, grounds for review have also arisen under Rule 10.1(b) because the decision of the Minnesota Supreme Court also conflicts with the recent decision of the Ninth Circuit in *U.S. v. City of Spokane*, No. 90-35118 (9th Cir. Oct. 31, 1990) (1990 U.S. App. Lexis 19119).

At issue in *City of Spokane* was whether a city could impose a gambling tax against the Inland Northwest Chapter of the American Red Cross ("INC").[5] The Ninth Circuit held that, because INC was a federal instrumentality, the tax violated the

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[5] The action was brought by the Federal Government on behalf of itself and INC. Respondents suggest that the Federal Government could likewise bring actions to prevent discriminatory taxation under 31 U.S.C. § 3124(a) (the current codification of 31 U.S.C. § 742), and that Petitioners have thus overstated the threat posed by the instant case to enforcement of that statute. (Resp. Br. 8-9.) However, while it is possible that the Federal Government could sue to enforce the statute, a review of numerous annotations under 31 U.S.C.A. § 3124(a) discloses not a single case in which the Federal Government has done so. The statute has been enforced through private actions exclusively.

doctrine of intergovernmental tax immunity. After refusing to apply its ruling prospectively only,[6] the Ninth Circuit considered the question of refunds.

INC sought to recover taxes for a six-year period that it had paid without protest. Washington, like Minnesota, permits refunds of taxes paid even though no protest is made at the time of payment. The Ninth Circuit held as follows:

> That the INC is entitled to relief can hardly be questioned. It is true that the exact form of relief is often left to the local governmental entity when a tax is struck down as unconstitutional. However, that is typically done in cases where there is a commerce clause violation which can be remedied in any one of a number of ways. *See, e.g., Ashland Oil, 110 S.Ct. at 3205; American Trucking, 110 S.Ct. at 2330; McKesson Corp., 110 S.Ct. at 2252.* That approach has no application here, for here, purely and simply, a tax has been exacted from a federal instrumentality. The only logical relief, aside from precluding further taxation, is to order the improperly taken monies refunded.

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[6] The Ninth Circuit refused to apply its ruling prospectively only because no new principle of law was established. The court also noted that "retroactive operation . . . [would encourage] local entities to tread carefully when they impose taxes on entities like the Red Cross," and that the equities favored INC because, although it had spent the tax revenues, the city "should have entertained the gravest doubts about its right to collect the tax." While the Ninth's Circuit's prospectivity ruling is not directly on point here, Petitioners note that the court's analysis is very similar to that urged by Petitioner's and adopted by the trial court in this case.

This holding of the Ninth Circuit is flatly in conflict with the Minnesota Supreme Court's decision in the instant case. The Minnesota Supreme Court distinguished *McKesson* as a Commerce Clause case and held that it did not have to order refunds because the proper remedy was to impose a fictional retroactive tax on state obligations. (Pet. App. 11A.) This, of course, is no remedy at all. The Ninth Circuit also recognized a distinction between Commerce Clause and intergovernmental immunity cases, but reached the opposite conclusion: A tax that violates the intergovernmental immunity doctrine must be refunded.

This Court in *McKesson* held that when a tax is "beyond the State's power to impose," then the state has "no choice but to 'undo' the unlawful deprivation by refunding the tax . . ." 110 S.Ct. at 2251. The Ninth Circuit's decision ordering refunds is consistent with *McKesson*; the decision of the Minnesota Supreme Court is not. Petitioners accordingly ask that the Court grant certiorari to resolve the conflict, and that the decision of the Minnesota Supreme Court be reversed.

III. Conclusion

For the reasons set forth above and in the petition for certiorari, Petitioners request that their petition for certiorari be granted.

Respectfully submitted,

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